<u>PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS</u>

Members of the public may submit written comments on draft advisory opinions.

DRAFT B of ADVISORY OPINION 2011-12 is now available for comment. It was requested by Marc E. Elias, Esq., Ezra W. Reese, Esq., and Jonathan S. Berkon, Esq., on behalf of Majority PAC and House Majority PAC, and is scheduled to be considered by the Commission at its public meeting on June 30, 2011.

If you wish to comment on Draft B of ADVISORY OPINION 2011-12, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 5:00 P.M. (Eastern Time) on June 29, 2011.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will he made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at http://saos.nictusa.com/saos/searchao.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor on requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will omsider the advisory opinion request. This one-weok period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram

Press Officer (202) 694-1220

Commission Secretary: Shawn Woodhead Werth

(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith

Associate General Counsel

(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2011-12, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at http://saos.nictusa.com/saos/searchao.

<u>ADDRESSES</u>

Office of the Commission Secretary Federal Election Commission 999 E Street, NW Washington, DC 20463

Office of General Counsel ATTN: Rosemary C. Smith, Esq. Federal Election Commission 999 E Street, NW Washington, DC 20463

AGENDA DOCUMENT NO. 11-37-A



FEDERAL ELECTION COMMISSION Washington, DC 20463



2011 JUN 28 P 4: 51

June 28, 2011

AGENDA ITEM

For Meeting of 6-30-11

SUBMITTED LATE

MEMORANDUM

TO:

The Commission

FROM:

Christopher Hughey

Acting General Counsel

Rosemary C. Smith Associate General Counsel

Robert M. Knop

Assistant General Counsel

Joanna S. Waldstreicher V

Attorney

Theodore M. Lutz

Attorney

Subject:

Draft AO 2011-12 (Majority PAC and House Majority PAC) -

Draft B

Attached is a proposed draft of the subject advisory opinion. We have been asked that this draft be placed on the agenda for June 30, 2011.

Attachment

2	Marc E. Elias, Esq.	
4 5	Ezra W. Reese, Esq. Jonathan S. Berkon, Esq.	DRAFT B
6	Perkins Coie LLP	
7	700 Thirteenth St., NW Suite 600	
8 9	Washington, DC 20005-3960	
10	Dear Messrs Elias, Reese, and Berkon:	
11	We are responding to your advisory opinion request on behalf of N	lajority PAC
12	and House Majority PAC (the "Committees"), concerning the application of the Federal	
13	Election Campaign Act of 1971, as amended (the "Act"), and Commission	regulations, to
14	the Committees' plan to ask Federal officeholders and candidates, and officers of national	
15	party committees, to solicit unlimited individual, corporate, and labor orga	nization
16	contributions on behalf of the Committees. The Commission concludes the	hat Federal
17	officeholders and candidates, and officers of national party committees, m	ay solicit
18	unlimited contributions from individuals, corporations, and labor organiza	tions on behalf
19	of these two political committees because they make only independent exp	enditures.
20	Background	
21	The facts presented in this advisory opinion are based on your lette	r received on
22	May 19, 2011, materials submitted in connection with Advisory Opinion 2	2010-11
23	(Commonsense Ten), and on publicly available reports filed with the Com	mission.
24	Majority PAC, under its previous name, Commonsense Ten, filed	its Statement
25	of Organization on June 11, 2010. On the same day, it filed an Advisory	Opinion
26	Request with the Commission regarding its planned activities. In its 2010	request,

¹ On March 9, 2011, Majority PAC filed an amended Statement of Organization indicating a паже change from Commonsense Ten to Majority PAC.

1 Majority PAC represented that it planned to pay for independent expenditures but that it

2 would not make any direct or in-kind contributions to Federal candidates, political party

3 committees, or to any other political committee that makes contributions to Federal

4 candidates or party committees. Advisory Opinion Request 2010-11 (Commonsense

5 Ten) at 3. Majority PAC also stated that it would solicit and accept contributions from

6 corporations and labor organizations, as well as from individuals and Federal political

committees in excess of \$5,000 a year. Id. It would not, however, solicit or accept

8 contributions from foreign nationals, Federal contractors, or national banks or

corporations organized by any law of Congress. Id. Majority PAC also stated that it

would report all contributions aggregating in excess of \$200 a year to the Commission.

11 *Id*.

7

9

16

17

The Commission approved the proposal in Advisory Opinion 2010-11

13 (Commonsense Ten). On July 27, 2010, Majority PAC filed a letter² with the

14 Commission in accordance with Advisory Opinion 2010-11 (Commonsense Ten) stating

its intent to make independent expenditures, raise funds in unlimited amounts, and that it

would not make any contributions to Federal candidates or political committees, whether

direct, in-kind, or by means of coordinated communications.

18 House Majerity PAC filed its Statement of Organization on April 11, 2011,

accompanied by a letter stating its intent to make independent expenditures, raise funds in

20 unlimited amounts, and that it would not make any contributions to Federal candidates or

21 political committees, whether direct, in-kind, or by means of coordinated

22 communications.

² The Commission approved the use of this same letter in Advisory Opinion 2010-09 (Club for Growth).

22

23

1 Both Committees represent that they have solicited and accepted contributions in 2 accordance with Advisory Opinion 2010-11 (Commonsense Ten), and that they report 3 these contributions to the Commission. Both Committees have filed the required 4 disclosure reports, and these reports are available on the Commission's website. 5 **Questions** Presented 6 I. May Federal officeholders and candidates, and officers of national party 7 committees, solicit unlimited contributions from individuals, corporations, and labor 8 organizations on behalf of political committees that make only independent expenditures? 9 2. If the answer to Question One is no, may Federal officeholders and 10 candidates, and officers of national party committees, participate in fundraisers for such 11 political committees, at which unlimited individual, corporate, and labor organization 12 contributions will be solicited, so long as the officeholders, candidates, and officers do 13 not themselves solicit such contributions? 14 Legal Analysis and Conclusions May Federal officeholders and candidates, and officers of national party 15 1. 16 committees, solicit unlimited contributions from individuals, corporations, and labor 17 organizations on behulf of political committees that make only independent expenditures? 18 Yes, Federal officeholders and candidates, and officers of national party 19 committees, may solicit unlimited contributions from individuals, corporations, and labor 20 organizations on behalf of those two political committees because the Committees make 21 only independent expenditures.

Federal officeholders and candidates, their agents, and entities directly or

indirectly established, financed, or maintained, or controlled by, or acting on behalf of,

- 1 Federal officeholders and candidates, may not raise or spend funds in connection with an
- 2 election for Federal office, "unless the funds are subject to the limitations, prohibitions,
- and reporting requirements of the Act." 2 U.S.C. 441i(e)(1)(A); 11 CFR 300.61. In
- 4 addition, national party committees, their officers and agents, and any entity that is directly
- 5 or indirectly established, financed, maintained, or controlled by a national party committee or
- 6 a national congressional campaign committee, may not solicit, receive, direct or spend "any
- funda [] that are not subject to the limitations, prohibitions, and reporting requirements of the
- 8 Act." 2 U.S.C. 441i(a)(1); 11 CFR 300.10(a). Funds "subject to the limitations,
- 9 prohibitions, and reporting requirements of the Act" are known as "Federal funds." See
- 10 11 CFR 300.2(g) (defining "Federal funds" as those that "comply with the limitations,
- prohibitions, and reporting requirements of the Act."). Therefore, Federal officeholders
- 12 and candidates soliciting funds in connection with a Federal election and officers of
- 13 national party committees may only solicit Federal funds. As explained below, the funds
- that these individuals will solicit on the Committees' behalf are Federal funds.
- 15 Accordingly, the Commission determines that the covered entities may solicit those funds
- on the Committees' behalf.

17

³ Persons subject to section 441i(e) also may not raise or spend funds in connection with any election other than an election for Federal office unless the funds are raised within the Act's contribution limits and are not from prohibited sources. 2 U.S.C. 441i(e)(1)(B); 11 CFR 300.62.

⁴ The Commission has also stated that Federal officeholders and officeholders soliciting funds in connection with a Federal election must not do so "in excess of the Act's amount limitations." Advisory Opinion 2006-24 (Republican and Democratic Senatorial Committees) (emphasis added).

1 I. The Act's Amount Limitations

2 The Act's amount limitations may not be applied constitutionally to Majority

- 3 PAC and House Majority PAC. See SpeechNow.org v. FEC, 599 F.3d 686, 689
- 4 (D.C. Cir. 2010) (en banc) ("SpeechNow"); see also EMILY's List v. FEC, 581 F.3d 1, 10
- 5 (D.C. Cir. 2009). The Commission decided in Advisory Opinion 2010-11
- 6 (Commonsense Ten) that "there is no basis to limit the amount of contributions to
- 7 [Majority PAC] from individuals, political committees" See also Advisory Opinica
- 8 2010-09 (Club for Growth). Because there is no longer an applicable amount limitation
- 9 for contributions to these independent expenditure-only committees, Federal
- 10 officeholders, candidates, and officers of national party committees would not solicit
- funds contrary to the Act's amount limitations by soliciting unlimited funds for these
- 12 independent expenditure-only committees.⁵

13 The absence of an applicable amount limitation does not compel a determination

14 that the funds at issue here are not Federal funds. First, such a reading would run

contrary to other interpretations of the Act in the Commission's regulations. See

generally 11 CFR 300.36(a) (recognizing that a State, district, or local committee of a

17 political party must use Federal funds when conducting Federal election activity even

though the committee may not be a political committee under 11 CFR 100.5 and

⁵ Also, the solicitation of contributions for Majority PAC and House Majority PAC by Rederal caudidates, officeholders, and officers of national party committees poses no risk of circumvention of candidate or national party committee contribution limits. In Advisory Opinion 2010-09 (Club for Growth), the Commission considered the risk of circumvention of candidate contribution limits posed by an independent expenditure-only committee's solicitation of funds earmarked for specific independent expenditures. The Commission found that "there [was] no possibility of circumvention of any contribution limit" because the committee represented that it would not "make any contributions or transfer any funds to any political committee if the amount of a contribution to the recipient committee is governed by the Act, nor will the committee make any coordinated communications or goordinate any expenditure" Id. Similarly, Majority PAC and House Majority PAC have also represented that they will make neither direct nor in-kind contributions.

- 1 therefore have no statutory reporting requirements with which to comply); 11 CFR
- 2 300.71 (recognizing that certain communications made by State and local candidates
- 3 "that [refer] to a clearly identified candidate for Federal office" must be paid for with
- 4 Federal funds despite the absence of any FEC reporting requirements associated with
- 5 those funds). Moreover, using the absence of a limitation with which to comply to create
- 6 a prohibition on the solicitation of those funds violates "the common mandate of statutory
- 7 construction to avoid absurd results." Rowland v. California Men's Colony, 506 U.S.
- 8 194, 200 (1993).

9

23

2. The Act's Source Prohibitions

10 The Act prohibits contributions from Federal contractors, foreign nationals, and 11 any corporation or labor organization in connection with a Federal election. See 12 2 U.S.C. 441b, 441c, and 441e. Before the Supreme Court's decision in Citizens United, 13 130 S.Ct. 876 (2010), section 441b also prohibited corporations and labor organizations 14 from making independent expenditures from their general treasury funds. See 15 Citizens United, 130 S. Ct. at 913. The Commission has determined, based on Citizens 16 United and SpeechNow, that there "exists no basis to limit . . . contributions . . . from 17 corporations and labor organizations" to Majority PAC. Advisory Opinion 2010-11 18 (Commonsense Ten). Majority PAC and House Majority PAC state that they will continue to comply with the constitutionally applicable source prohibitions and will not 19 20 "solicit or accept funds from foreign nationals . . . federal contractors . . . or national 21 banks or corporations organized by act of Congress." Because there is no longer an 22 applicable source prohibition on contributions from corporations and labor organizations

to these independent expenditure-only committees, Federal officeholders, candidates, and

- officers of national party committees would not solicit funds contrary to the Act's source
- 2 prohibitions by soliciting funds from corporations and labor organizations for these
- 3 independent expenditure-only committees.
- 4 3. The Act's Reporting Requirements
- 5 The Act establishes reporting requirements for political committees. See
- 6 2 U.S.C. 432, 433, and 434. The court in SpeechNow upheld the constitutionality of
- 7 reporting requirements as applied to SpeechNow. See SpeechNow, 599 F.3d at 689;
- 8 Advisory Opinion 2010-11 (Commonsense Ten). Majority PAC and House Majority
- 9 PAC do not contest their obligation to file disclosure reports, and the PACs have filed
- 10 these reports. Therefore, the funds that Federal officeholders, candidates, and officers of
- 11 national party committees would solicit on behalf of the Committees would comply with
- the Act's reporting requirements.
- 13 2. If the answer to Question One is no, may Federal officeholders and
- 14 candidates, and officers of national party committees, participate in fundraisers for such
- 15 political committees, as which unlimited individual, corporate, and labor organization
- 16 contributions will be solicited, so long as the officeholders, candidates, and officers do
- 17 not themselves solicit such contributions?
- This question is most because the answer to Question One is "yes."
- This response constitutes an advisory opinion concerning the application of the
- 20 Act and Commission regulations to the specific transaction or activity set forth in your
- 21 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
- of the facts or assumptions presented, and such facts or assumptions are material to a
- 23 conclusion presented in this advisory opinion, then the requestor may not rely on that

1	conclusion as support for its proposed activity. Any person involved in any specific	
2	transaction or activity which is indistinguishable in all its material aspects from the	
3	transaction or activity with respect to which this advisory opinion is rendered may rely o	
4	this advisory opinion. See 2 U.S.C. 437f(c)(1)(B). Please note the analysis or	
5	conclusions in this advisory opinion may be affected by subsequent developments in the	
6	law including, but not limited to, statutes, regulations, advisory opinions, and case law.	
7	The cited advisory opinions are available on the Commission's website, www.fec.gov, or	
8	directly from the Commission's Advisory Opinion searchable database at	
9	http://www.fec.gov/searchao.	
10		
11		
12	On behalf of the Commission,	
13		
14		
15		
16	Cynthia L. Bauerly	
17	Chair	
18		
19		